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No. 04-142

IN THE

SUPREME COURT OF THE UNITED STATES

EVANDRO S. SANTINI, *et al.*,

Petitioners,

v.

CONNECTICUT HAZARDOUS WASTE MANAGEMENT SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners Evandro S. Santini and Santini Homes, Inc. hereby reply to the Opposition to Petition for a Writ of Certiorari ("Opposition") filed August 30, 2004, by the Respondent Connecticut Hazardous Waste Management Service (the "Service").

THE SANTINI PETITION FOCUSES ON CONFLICTS AMONG DECISIONS OF THIS COURT ON THREE FIFTH AMENDMENT TAKINGS CLAUSE ISSUES: WHETHER ALL ACTIVITY BY A CONDEMNOR SHORT OF ACQUISITION IS EXEMPT FROM LIABILITY; WHETHER, UNDER *PENN CENTRAL*, CONDEMNATION SHOULD BE ANALYZED IN THE SAME MANNER AS GOVERNMENT REGULATION OF PRIVATE LAND USE; AND WHETHER *ARMSTRONG* REMAINS GOOD LAW.

The Service's Opposition, like the Second Circuit's decision in this case, focuses on the fact that the Service used its power of condemnation but then reversed course before completing several prerequisites to the formal acquisition of title to the Santini subdivision. Santini's Petition, however, focuses not on what the Service did or did not do, but on three conflicts among decisions of this Court that necessarily arise if the Second Circuit's decision was correct.

The Petition first points out that if *Agins v. Tiburon*, 447 U.S. 255 (1980) and *First English Evangelical Lutheral Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987) state a categorical rule that "pre-condemnation activity" is exempt from the Fifth Amendment Takings Clause, then they conflict with *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)

and *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). These latter cases hold that takings claims should not be resolved using categorical rules, but by balancing the three *Penn Central* factors; and that takings analysis evaluates the impact of the government's action on the property and its owner, not whether the government sees its efforts through to completion. If the Second Circuit was correct, a court may adjudicate a taking claim arising from use of condemnation powers by going no further than determining whether the government action at issue was "pre-condemnation"; if so, it need not inquire into the economic impact, interference with the owner's investment-backed expectations, and whether the government was acting for its own benefit or adjusting economic benefits and burdens among private property owners.

The second conflict is betwwen the line of cases starting with *Danforth v. U.S.*, 308 U.S. 271 (1939), which hold that economic impacts on property owners due to government regulation are incidents of ownership, and *Tahoe-Sierra*'s holding that a substantial economic impact that results from condemnation is not an incident of ownership, but government interference with private land use which, if severe enough, constitutes a taking.

Finally, the Petition raises the continuing vitality of *Armstrong v. U.S.*, 364 U.S. 40 (1960), a decision whose principle – that a taking has occurred when a private land owner is forced to bear a substantial economic burden on behalf of the general public – seems tailor-made for this case, but was not mentioned by the Second Circuit, apparently due to its reliance on *Agins* and *First English.*

The Service says nothing about these conflicts. The Service's Opposition is emblematic of the type of argument that a condemnor will make to a court when

defending itself against a taking claim arising out of condemnation, but it does not address the Questions Presented, which ask how a court faced with such an argument should adjudicate the claim.

This Court has now repeatedly held that except in those limited circumstances presented in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992) (a permanent taking premised on a total loss of economically viable use), the *Penn Central* balancing analysis must be utilized. The meaning of the three factors and their interrelationship now form the core of the Takings Clause of the Fifth Amendment. If there is a categorical exception, a preemptive analysis, for "precondemnation activity," its existence and scope need to be clarified. Land owners and land use regulators need to know if *Tahoe-Sierra*'s discussion of the difference between condemnation and regulation was *dictum* or otherwise limited, and whether *Armstrong*'s principle still survives or is subsumed in the *Penn Central* analysis. As noted in the Petition, because the Fifth Amendment Takings Clause is a national minimum standard for the protection of property rights, the meaning of the *Penn Central* factors underlies every taking claim arising from the use of condemnation in both state and federal court. As the Brief of the National Association of Home Builders as *Amicus Curiae* has pointed out, condemnation is an area of constitutional law that state supreme courts are now addressing frequently, and reaching diametrically opposite conclusions.

Although not essential to the Questions Presented, the Petitioners must comment on two erroneous factual statements made in the Service's Opposition. First, the steps undertaken here by the Service were not preliminary, nor was the condemnation a process that "barely began." In fact, the condemnation at issue in this case

began in earnest in Connecticut when the state legislature in 1987 adopted the statute that directed the Service to promptly locate and condemn an in-state site for disposal of radioactive waste, in order to help Connecticut avoid substantial financial penalties that the federal government was threatening. From 1987 through June 1991, the Service worked feverishly, in secret, to identify the site to condemn. In June 1991 it identified publicly three finalists, the Santini property and two other sites in close proximity. But as testified by Susan Shimelman, Undersecretary of Connecticut Office of Policy and Management, the June 10, 1991 announcement was "the end of the process" and the Service "had no alternative but to proceed" with condemnation. Santini Petition Appendix at 44a.

The petitioners are also constrained to point out that the Connecticut courts did not make a finding of fact that the subject property "retained value" during the condemnation process or in the months afterward. In fact, in its 1999 opinion, 251 Conn. at 135 n.19, 739 A.2d at 688 n.19, the Connecticut Supreme Court made clear that it was resolving the case as a matter of state constitutional law and that it was therefore "not necessary" for it to address Santini's factual claims of economic loss. The Service's assertion (Opposition at 2, n.1) to the contrary is inaccurate – as well as emblematic of the fact that since late 1997, the Service has been in full retreat from the opinion of its real estate appraiser, Dr. Kinnard, who agreed with Santini's appraiser that once the Service announced the condemnation in June 1991, Santini had no hope of selling any of the finished houses, the completed lots, or proceeding with the remaining phase of his residential development, and this impact lasted for two years.

The Petition before the Court fits squarely into that category of cases identified in the Court's rules as eligible for a writ of certiorari, *i.e.*, a decision below that raises conflicts among decisions of this Court, and on an issue of national importance.

Respectfully submitted,

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